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IN THE

OFFICE OF THE

Supreme Court of the United States

COLLEEN P. KRAMER,

Petitioner,

v.

BANC OF AMERICA SECURITIES, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff claiming retaliation against an employer under the Americans with Disabilities Act, 42 U.S.C. § 12203, can recover compensatory and punitive damages and, therefore, has a right to a trial by jury.

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Petitioner, Colleen P. Kramer, respectfully petitions for a writ of certiorari to review the opinion and decision of the United States Court of Appeals for the Seventh Circuit dated January 20, 2004.

OPINIONS AND ORDERS BELOW

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit were issued on January 20, 2004. The court of appeals affirmed the decision of the United States District Court for the Northern District of Illinois which denied Petitioner a trial by jury under the Americans with Disabilities Act. The Seventh Circuit's opinion (App. 1a-16a) is reported at 355 F.3d 961 (7th Cir. 2004). The district court's Findings of Fact and Conclusions of Law, entered after trial without a jury, is not reported but is reproduced in Appendix B, pages 17a-37a. Petitioner's jury demand was stricken by the district court on May 10, 2002. (App. 39a.)

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit from which Petitioner seeks review was entered on January 20, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of 42 U.S.C. §§ 12112, 12117, 12203, 2000e-5 and 1981a are lengthy and, therefore, are set out in Appendix D, pages 40a-48a, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

A. *The Complaint*

Petitioner Colleen P. Kramer filed her Complaint and jury demand against her former employer, Banc of America Securities, LLC ("BOA"), in the United States District Court for the Northern District of Illinois under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (the "ADA"). The basis for federal jurisdiction in the district court was pursuant to 28 U.S.C. §§ 1331 and 1343(a). A victim of multiple sclerosis, Petitioner alleged that BOA had intentionally discriminated against her in her employment because of her disease. She also alleged that she was fired from her job in retaliation for asserting her rights under the ADA, including the filing of a charge of disability discrimination with the EEOC. She requested relief in the form of back pay, front pay, compensatory damages, punitive damages, loss of benefits and attorneys' fees.

B. *The Statutory Framework of the ADA*

The Americans with Disabilities Act of 1990 prohibits employers from discriminating against employees because of a disability. (42 U.S.C. § 12112(a).) This includes the prohibition of an employer's retaliatory actions against employees who make a charge of discrimination in any proceeding. (42 U.S.C. § 12203(a).) The remedies available for aggrieved employees claiming retaliation under 42 U.S.C. § 12203 are those remedies available under 42 U.S.C. § 12117. In turn, 42 U.S.C. § 12117 refers to the "powers, remedies and procedures" in the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, which are available to "any person alleging discrimination on the basis of disability."

Under 42 U.S.C. § 2000e-5(g), then, an ADA plaintiff's remedy for intentional discrimination was injunctive relief including job reinstatement, back pay or "any other equitable relief."

Against the statutory backdrop described above, the Civil Rights Act of 1991 amended and expanded the remedies available to a "complaining party" claiming intentional discrimination in employment. Under 42 U.S.C. § 1981a(a)(1), an employee bringing an action under 42 U.S.C. § 2000e-5, as cross-referenced by the retaliation and remedy provisions of the ADA, 42 U.S.C. §§ 12117 and 12203, also may "recover compensatory and punitive damages." Although 42 U.S.C. § 1981a(a)(2) also refers to the availability of compensatory and punitive damages in an action brought under the ADA for an employer's violation of 42 U.S.C. § 12112, the retaliation provision (42 U.S.C. § 12203) is not mentioned.

Petitioner contends that she was entitled to compensatory and punitive damages under the ADA pursuant to the remedies available under the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5, as amended by the 1991 Civil Rights Act, 42 U.S.C. §§ 1981a(a)(1) and (a)(2). Therefore, Petitioner should have been entitled to a trial by jury under 42 U.S.C § 1981a(c).

C. *The Proceedings Below*

The District Court —

BOA moved for summary judgment of dismissal on Petitioner's ADA claims. The district court granted summary judgment on her claim of disability but denied summary judgment on the claim of retaliation. BOA then moved to strike Petitioner's jury demand on the claimed ground that the ADA did not permit the recovery of compensatory and punitive

damages for a retaliation claim. Over Petitioner's objection, the district court ruled that she was not entitled to recover compensatory or punitive damages and granted BOA's motion to strike her jury demand. (App. 4a, 15a, 24a n.1, 38a.)

Shortly after Petitioner's jury demand was stricken, the case proceeded to trial before the district court on Petitioner's retaliatory discharge claim. The district court entered Findings of Fact and Conclusions of Law in favor of BOA and entered judgment accordingly. (App. 17a-37a.) The underlying facts are also described in the court of appeals' Opinion at pages 2a-3a of the Appendix. Petitioner appealed the district court's ruling on the unavailability of compensatory and punitive damages under the ADA and the lower court's striking of her jury demand, but the court of appeals affirmed the rulings below. (App. 15a.)

The Court of Appeals —

On appeal, Petitioner argued that she was entitled to seek compensatory and punitive damages under the ADA for a retaliatory discharge and that she was therefore entitled to a trial by jury. (App. 1a.) The court of appeals affirmed "the district court's decision to deny consideration of compensatory and punitive damages, and its decision to conduct the trial in this case without a jury." (App. 1a-2a.)

The Seventh Circuit correctly stated that remedies for a party making a retaliation claim against an employer under the ADA "are first determined by reference to 42 U.S.C. § 12117." (App. 6a.) That section, in turn, provides that the "available remedies" are those provided by the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-4 through e-9. *Id.* The 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(g)(1), however, did

not provide for compensatory or punitive damages before the 1991 amendments. (App. 6a.) However, as the court of appeals also correctly stated, the 1991 Civil Rights Act, 42 U.S.C. § 1981a(a)(2), "expands the remedies available" under the 1964 Act, Section 2000e-5(g)(1), "in certain circumstances, *to provide for compensatory and punitive damages*." *Id.* (Emphasis added.) The Seventh Circuit agreed that, had Petitioner been entitled to recover compensatory and punitive damages, she would have been entitled to "a jury trial as a matter of right" under 42 U.S.C. § 1981a(c)(1). (App. 12a.) Nevertheless, the Court held that Section 1981a(a)(2) of the 1991 Civil Rights Act as applied to the ADA, although it expanded the available remedies, does not permit a plaintiff making a claim of retaliation to recover compensatory or punitive damages. Therefore, the Court ruled, Petitioner has "no statutory or constitutional right to a jury trial." (App. 10a.)

In reaching its conclusion, the court of appeals relied upon the analysis contained in *Brown v. City of Lee's Summit, Mo.*, 1999 WL 827768, *2-*4 (W.D. Mo. 1999). (App. 7a.) Thus the Seventh Circuit agreed with the holding in *Brown* that "'a meticulous tracing of the language of this *tangle of interrelated statutes* reveals no basis for plaintiff's claim of compensatory and punitive damages in her ADA retaliation claim.'" *Id.* (Emphasis added.) Therefore, the court of appeals concluded, because "claims of retaliation under the ADA ([42 U.S.C.] § 12203) are not listed [under 42 U.S.C. § 1981a(a)(2)], compensatory and punitive damages are not available for such claims." *Id.* at 8a. As a result, the Court stated, Petitioner's remedies were limited to those equitable remedies against an employer such as back pay, front pay, job reinstatement and injunctive relief as set forth in 42 U.S.C. § 2000e-5(g)(1). *Id.*

REASONS FOR GRANTING THE PETITION

This case presents this Court with a valuable opportunity to resolve a question under federal employment law which the Seventh Circuit stated "appears to be one of first impression for federal circuit courts," a question that is critical to thousands of aggrieved employees. Namely, that question — on which there now is considerable inconsistent circuit court and district court authority — is whether ADA plaintiffs are entitled to compensatory and punitive damages as well as trial by jury for intentional retaliation claims. The question is recurring throughout the federal courts.

The Seventh Circuit and at least three other circuits are now divided, not only about approvals of ADA retaliation jury trials, but also about the rationale. District courts in circuits that have not yet decided the issue are also coming to different conclusions. Much of the conflict is over the interpretation of the damage remedies available to ADA plaintiffs under 42 U.S.C. § 2000-5, as amended and expanded by 42 U.S.C. § 1981a. The Court should seize this opportunity to resolve the disagreement among the circuits, correct the serious error made by the Seventh Circuit in this case and clarify an issue facing the district courts which can critically deprive victimized employees of their Seventh Amendment right to a trial by jury.

Although other circuit courts of appeals have not yet specifically analyzed the "tangle of interrelated statutes" as the Seventh Circuit did by reference to the *Brown* decision, this Court should not wait for further decisions on the question presented because the law in the circuit and district courts is now in conflict and can only become more sharply divided over time. The Equal Employment Opportunity

Commission also has taken a position contrary to the Seventh Circuit in its Compliance Manual, Section 8 ("Retaliation"), where it states that "[c]ompensatory and punitive damages . . . are available for retaliation claims brought under . . . the ADA." (May 20, 1998.) The time is ripe for the Court to set the record straight. In the alternative, Petitioner respectfully suggests that the Court consider inviting the Solicitor General to file a brief expressing the views of the EEOC.

I. THE DECISION BELOW CONFLICTS WITH THE SETTLED LEGAL UNDERSTANDINGS OF OTHER CIRCUIT COURTS OF APPEALS

An employee's fundamental right to a trial by jury under the ADA is at stake. This Court's decision in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564-65, 110 S. Ct. 1339, 1344-45 (1990), held that an employee seeking back pay for a union's alleged breach of its duty of fair representation had a right to a jury trial under the Seventh Amendment. Regarding the Seventh Amendment and the importance of the jury system, this Court stated:

> Since the merger of the systems of law and equity, see Fed.Rule Civ.Proc. 2, this Court has carefully preserved the right to trial by jury where legal rights are at stake. As the Court noted in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501, 79 S.Ct. 948, 952, 3 L.Ed.2d 988 (1959), "Maintenance of the jury as a *fact-finding body is of such importance* and occupies so firm a place in our history and jurisprudence that any seeming *curtailment of the right to a jury trial should be scrutinized with the utmost care*."

> (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed. 603 (1935)). (Emphasis added.)

Because Petitioner is seeking and should be entitled to recover compensatory and punitive damages, which are legal in nature, the Seventh Amendment should entitle her to a jury trial for her claim of retaliation under the ADA.

In the opinion below, the Seventh Circuit acknowledged that the Second, Eighth and Tenth Circuit Courts of Appeals "have affirmed jury verdicts where compensatory damages had been awarded on ADA retaliation claims." (App. 6a-7a.) See *Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999); *Salitros v. Chrysler Corp.*, 306 F.3d 562, 570 (8th Cir. 2002); *E.E.O.C. v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1244-45 (10th Cir. 1999). Accord, *Foster v. Time Warner Entertainment Co.*, 250 F.3d 1189, 1196-98 (8th Cir. 2001). Although the court below stated that none of these circuit decisions "examined the legal question of whether [compensatory and punitive] damages [under 42 U.S.C. § 1981a(a)(2)] were authorized for an ADA retaliation claim", the three circuits nonetheless permitted juries to decide compensatory and punitive damages in ADA retaliation cases. (See App. 7a.) The Seventh Circuit also noted that the six district courts which "have addressed the question are split." *Id.*

1. ***The Eighth Circuit —***

Although the Seventh Circuit expressly adopted the Missouri district court's analysis in the 1999 *Brown v. City of Lee's Summit* decision, a subsequent and more recent opinion by the Eighth Circuit in *Salitros v. Chrysler Corp.*,

306 F.3d 562 (8th Cir. 2002), affirmed a jury's verdict of $100,000 in punitive damages and $445,516 in front pay on plaintiff's claim that Chrysler retaliated against him for exercising his rights under the ADA. Like Petitioner, Salitros' claim arose under 42 U.S.C. § 12203. *Id.* at 569. On appeal, Chrysler argued "that there was no evidence to support the award of punitive damages under the standard adopted for liability under 42 U.S.C. § 1981a(b)(1)", but it was rejected by the court. *Id.* at 570. In addition, the court stated that its reasoning also "leads us to deny Chrysler's separate argument that the district court erred in submitting punitive damages to the jury." *Id.* As a result, the Eighth Circuit held that punitive damages are an appropriate remedy for a retaliation claim under the ADA. Therefore, the Seventh Circuit's reliance on *Brown*, a district court decision ignored by its own circuit court, is misplaced.

Likewise, the Eighth Circuit also affirmed a jury verdict awarding damages for lost wages, compensatory damages and punitive damages against an employer for retaliation under the ADA in another decision after *Brown* in *Foster v. Time Warner Entertainment Co.*, 250 F.3d 1189 (8th Cir. 2001). Accord, *Stafine v. Unicare Homes*, 266 F.3d 771 (8th Cir. 2001.) In *Foster*, the Court expressly found that the trial court had correctly instructed the jury on "the relevant [ADA] law for retaliation and damages" which included punitive damages. *Id.* at 1197-98. It is important to note that the Eighth Circuit's decisions in *Salitros*, *Foster* and *Stafine* were issued not only after the Missouri district court's contrary decision in *Brown*, but also after the contrary decisions within the same circuit by Kansas district courts in *Sink v. Wal-Mart Stores*, 147 F. Supp. 2d 1085 (D. Kans. 2001) and *Boe v. AlliedSignal*, 131 F. Supp. 2d 1197 (D. Kans. 2001). (*See* App. 7a.) Both of the Kansas district court

decisions were cited with approval by the Seventh Circuit in this case. *Id.* While the precise issue of whether a plaintiff is entitled to recover compensatory and punitive damages for a retaliation claim under the ADA was not specifically analyzed in *Salitros* or *Foster*, it is clear that the trial courts in those cases and the Eighth Circuit confirmed that they are indeed recoverable, squarely in conflict with the Seventh Circuit. Moreover, the *Foster* court held that the district court's jury instructions regarding retaliation and damages were proper:

> The [district] court correctly instructed the jury that Foster had to prove that she had an objectively reasonable belief that Time Warner's treatment of Terry violated the ADA, not that it actually was in violation of the law. The jury was instructed that it should determine whether Foster had a reasonable good faith belief that Terry was a qualified individual entitled to a reasonable accommodation which was not an undue hardship, and ultimately if she engaged in protected conduct. The court also correctly used the *Kolstad* standard to instruct the jury on *punitive* damages . . . The instructions on Foster's claim of *retaliation* and *punitive* damages *adequately stated the law.* 250 F.3d at 1198. (Emphasis added.)

Finally, the court stated that "the defense to damages instruction in 42 U.S.C. § 1981a(a)(3) requested by Time Warner was not appropriate because Foster's claim was for retaliation under 42 U.S.C. § 12203(a)," as was Petitioner's claim here. *Id.*

2. *The Second Circuit —*

In *Muller v. Costello*, 187 F.3d 298 (2nd Cir. 1999), the Second Circuit — contrary to the Seventh Circuit's decision below — affirmed the jury's finding of liability and compensatory damages in favor of the plaintiff solely on his claim of retaliation in violation of the ADA, 42 U.S.C. § 12203. On appeal, the *Muller* court agreed with the defendant's argument that the evidence was insufficient to find that the plaintiff suffered from a disability within the meaning of the ADA. 187 F.3d at 298. Nonetheless, the court affirmed the jury's award of compensatory damages as "justified solely on the retaliation finding." *Id.* at 314. The court also stated that it is "appropriate to apply the framework used in analyzing retaliation claims under Title VII [42 U.S.C. § 2000e-5] in analyzing a claim of retaliation under the ADA." *Id.* at 311. See also *Lovejoy–Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223-24 (2d Cir. 2001). The "framework", of course, is the same as that reviewed by the Seventh Circuit below.

3. *The Tenth Circuit —*

In *E.E.O.C. v. Wal-Mart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999), the Tenth Circuit, like the Second and Eighth Circuits, also affirmed a jury verdict awarding both compensatory and punitive damages on a claim of disability discrimination and retaliation in violation of the ADA. Citing this Court's decision in *Kolstad v. American Dental Ass'n.*, 527 U.S. 526, 119 S. Ct. 2118 (1999) regarding the issue of punitive damages in ADA cases under 42 U.S.C. § 1981a(a)(1), the court of appeals extensively analyzed the standard of proof for punitive damages. In *Wal-Mart Stores*, the court of appeals also found that the "punitive damages

analysis is the same for Title VII [42 U.S.C. § 2000e-5] and ADA claims. *See* 42 U.S.C. 1981[a](a)(2)." 187 F.3d at 1245, n.2.

As discussed above, the Second, Eighth and Tenth Circuits have expressly allowed plaintiffs in retaliation cases under the ADA to seek and recover both compensatory and punitive damages in trials by juries. Because of this clear conflict between these courts of appeals and the Seventh Circuit, together with the uniform decisions in the district courts outside the Eighth Circuit, as discussed below, certiorari is warranted to settle the issue.

4. *The District Courts Outside the Eighth Circuit —*

Although the remaining circuits have yet to address appeals from jury verdicts awarding plaintiffs compensatory and punitive damages in ADA retaliation cases, other district courts within the First, Second, Fourth, Sixth and Ninth Circuits have reached results which conflict with the Seventh Circuit. Indeed, the only federal decisions which are consistent with the Seventh Circuit's decision are from the Missouri and Kansas district courts issued *before* the Eighth Circuit's *Salitros*, *Foster* and *Stafine* decisions in 2002.

• In the First Circuit, the Maine district court held that an ADA plaintiff claiming retaliation was entitled to a trial by jury for damages. *Braverman v. Penobscot Shoe Co.*, 859 F. Supp. 596 (D. Me. 1994). The district court examined the same issue presented by Petitioner here regarding a claim for retaliation under the ADA and analyzed the applicable statutes. The defendant had filed a "Motion to Define Scope

of Jury Trial under the ADA." 859 F. Supp. at 605. The court stated, "[t]he Seventh Amendment preserves the right to trial by jury in 'suits at common law.' 'Suits at common law' refers to 'suits in which *legal* rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized, and equitable remedies are administered.'" *Id.* (citing *Chauffeurs, Teamsters, and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990)). (Emphasis in original.) Therefore, the court implied that the plaintiff had a constitutional right to a jury trial for an ADA retaliation claim. The court also stated that "[i]f an employer violates Title I of the ADA, the employees are entitled to those remedies available to employees under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117." *Id.* It was noted that before 1991, Title VII authorized courts to enjoin unlawful employment practices and grant such remedies as reinstatement, hiring of employees and back pay in accordance with 42 U.S.C. § 2000e-5(g) and stated that these remedies "are equitable, and have not historically required trial by jury." (*Id.*) However, the *Braverman* court continued and held:

> The Civil Rights Act of 1991, however, broadened the relief available for an employer's intentional discrimination. Employees who prevail on their claims may now recover compensatory and punitive damages. 42 U.S.C. § 1981a(a)(2). Further, if a complaining party seeks compensatory and punitive damages, she may demand and receive a trial by jury. 42 U.S.C. § 1981a(c)(1). *Id.*

Therefore, the court concluded that because the plaintiff's ADA retaliation claim sought compensatory and punitive damages, in addition to the traditional Title VII damages such

as back pay, benefits, and reinstatement or front pay, he was "entitled to a jury trial on liability and damages." *Id.*

• In the Second Circuit, the United States District Court for the Western District of New York resolved the perceived statutory conflict regarding the availability of compensatory and punitive damages (and hence a right to a trial by jury) to an ADA plaintiff claiming retaliation. *Lovejoy-Wilson v. NOCO Motor Fuels, Inc.*, 242 F. Supp. 2d 236 (W.D.N.Y. 2003). There the court examined precisely the issues raised in the courts below, namely BOA's motion to strike Petitioner's jury demand in an ADA retaliation suit, based upon the argument that compensatory and punitive damages are not recoverable. The *Lovejoy* court noted that the defendant relied primarily upon *Brown v. City of Lee's Summit, Mo., supra*, 1999 WL 827768 (W.D. Mo. 1999), the same decision adopted by the Seventh Circuit in Petitioner's case. (*See* App. 7a.) 242 F. Supp. 2d at 240-41.

The *Lovejoy* court recognized that the *Brown* court had concluded that Congress did not intend to permit a plaintiff suing for employment retaliation under 42 U.S.C. § 12203(a) to recover compensatory or punitive damages. *Id.* The *Lovejoy* court also noted that two other district courts had reached different results on the same issue. *Id.* (citing *Boe v. AlliedSignal, Inc.*, 131 F. Supp. 2d 1197 (D. Kan. 2001) (relying on *Brown* and holding that compensatory and punitive damages are not recoverable for ADA retaliation) and *Ostrach v. Regents of the Univ. of California*, 957 F. Supp. 196 (E.D. Cal. 1997) (holding that compensatory and punitive damages are recoverable and a jury trial is available.) (*See also* App. 7a.)

The *Lovejoy* court disagreed with both the *Brown* and *Boe* decisions, which were cited with approval by the Seventh Circuit in Petitioner's case (at App. 7a), and held that the plaintiff was entitled to recover compensatory and punitive damages under her ADA retaliation claim and, therefore, also was entitled to a jury trial. *Lovejoy*, 242 F. Supp. 2d at 240-241. The *Lovejoy* court rejected the defendant's reliance upon *Brown* because of the more recent Eighth Circuit decisions:

> [M]ore recent decisions from the United States Court of Appeals for the Eighth Circuit (in which the Western District of Missouri is located) have recognized the appropriateness of having a jury consider ADA retaliation claims. *See, e.g., Foster v. Time Warner Entertainment Company, L.P.*, 250 F.3d 1189 (8th Cir. 2001) (affirming jury verdict finding that the plaintiff was terminated in retaliation for opposing unlawful discrimination under the ADA, and awarding lost wages and compensatory and punitive damages); *see also Stafine v. Unicare Homes*, 266 F.3d 771 (8th Cir. 2001) (affirming jury verdict in favor of employer on claims of disability discrimination and retaliation for filing EEOC complaint). In light of these circuit court decisions, NOCO's reliance on the district court's holding in *Brown* is unconvincing.

In addition, the *Lovejoy* court noted that "courts within the Second Circuit have routinely allowed juries to decide ADA retaliation claims." *Lovejoy*, 242 F. Supp. 2d at 240-41. In fact, the *Lovejoy* court analyzed and based much of its reasoning on the Second Circuit's decision in *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999). *Id.* (*See also* App. 7a.) Finally, the *Lovejoy* court relied upon the Second Circuit's decision remanding the

case for further proceedings, which contained several references indicating that the circuit court's intent was that *Lovejoy's* retaliation claim be tried by a jury. *Id. See Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223-24 (2d Cir. 2001) (a "*jury* could reasonably find" that NOCO's statements in a January 1994 letter provided a basis for retaliation claim; "[a] *jury* could conclude" that plaintiff was suspended without pay for a week shortly after filing the EEOC complaint; time span between filing of EEOC complaint and suspension "is short enough to permit a *jury* to infer a causal connection" between protected activity and adverse employment action). (Emphasis added.)

• In the Fourth Circuit, a district court also held that a jury trial on compensatory damages is available to a plaintiff on her ADA retaliation claim after tracing the legislative history of the ADA and the provisions of Title VII. *Rhoads v. FDIC*, 2002 WL 31755427 (D. Md. 2002). The *Rhoads* court relied in part on *Baird v. Rose*, 192 F.3d 462, 471-72 (4th Cir. 1999), holding that the remedies for a violation of 42 U.S.C. § 12203 in the employment context are set forth in 42 U.S.C. § 12117.

• In the Sixth Circuit, the United States District Court for the Eastern District of Michigan held that general damages were available under the ADA's antiretaliation provisions. *Niece v. Fitzner*, 922 F. Supp. 1208, 1219 (E.D. Mich. 1996). In *Niece*, the court noted that this Court in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S. Ct. 1028 (1992) found "general damages available under Title IX of the Civil Rights Act of 1964. Consequently compensatory damages are available to plaintiffs asserting claims under 42 U.S.C. §§ 12132 and 12203." 922 F. Supp. at 1219.

• In the Ninth Circuit, the Eastern District of California analyzed the ADA remedial scheme as expanded by 42 U.S.C. § 1981a and concluded that a plaintiff could recover compensatory and punitive damages in a retaliation suit. *Ostrach v. Regents of the Univ. of California*, 957 F. Supp. 196, 201 (E.D. Cal. 1997). There the court held that the plaintiff could recover compensatory and punitive damages in his ADA retaliation suit because "where Congress provides a cause of action, a federal court must presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." (*citing Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992).). In addition, the court stated, "it appears to the court that Congress has provided for the recovery of both general and punitive damages for a willful violation of the anti-retaliation provisions of the ADA." *Id.* The court stated that this conclusion is buttressed by the established principle that:

> 'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' *Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777 (1964)).

The *Ostrach* court determined that the retaliation provision of the ADA, 42 U.S.C. § 12203(a), extended the remedies available pursuant to 42 U.S.C. §§ 12117, 12133 and 12188, to an aggrieved plaintiff. *Id.* The court then noted that 42 U.S.C. § 1981a(a)(2) provided:

> [i]n an action brought by a complaining party under the powers, remedies and procedures set forth in § 716 or 717 of the Civil Rights Act

> of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990) (42 U.S.C. §12117(a)) . . . against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory and punitive damages. . . . *Id.*

Finally, the *Ostrach* court noted that "complaining party" is defined in 42 U.S.C. § 1981a(d)(1)(b) to "include persons who bring actions under Title I of the Americans with Disabilities Act." *Id.* at 201. Accordingly, the court found that retaliation suits under the ADA allowed for recovery of compensatory and punitive damages:

> The Civil Rights Act of 1991, however, broadened the relief available for an employer's intentional discrimination. Employees who prevail on their claims may now recover compensatory and punitive damages. 42 U.S.C. § 1981a(a)(2). Further, if a complaining party seeks compensatory and punitive damages, she may demand and receive a trial by jury. 42 U.S.C. § 1981a(c)(1). *Id.*

Therefore, the court held that because the plaintiff's ADA retaliation claim sought compensatory and punitive damages, in addition to the traditional Title VII damages such as back pay, benefits, and reinstatement or front pay, he was "entitled to a jury trial on liability and damages." *Id.*

As the several circuit court and district court rulings demonstrate, the question of whether a plaintiff claiming retaliation against an employer under the ADA can recover compensatory and punitive damages with a right to a trial by jury, irreconcilable conflict of previously settled law under

a 14-year-old statute has resulted. This conflict between the Seventh Circuit, which relied upon the Missouri district court decision in *Brown*, overruled *sub silentio* by later Eighth Circuit decisions, stems from a fundamental disagreement over the breadth of the damage remedies available to an ADA claimant under 42 U.S.C. § 2000e-5 as amended by 42 U.S.C. § 1981a. There is no realistic probability that the conflict will disappear without an interpretation from this Court. Therefore, further review is now needed.

II. THE ISSUES RAISED ARE RECURRING AND CRITICAL FOR THOUSANDS OF ADA RETALIATION CLAIMANTS

Whether Congress intended to include compensatory and punitive damages as additional remedies available under the ADA's antiretaliation scheme, 42 U.S.C. § 2000e-5 as amended by 42 U.S.C. § 1981a, is an important issue of federal law. At least equally significant is the ADA plaintiff's Seventh Amendment right to a trial by jury, an obvious cornerstone of our judicial system. As the above opinions illustrate, given the number of "complaining parties" who file employment retaliation claims under the ADA every year, this issue will recur. As a result, the courts will continue to reach different conclusions under the diverse interpretations of the Seventh Circuit below as well as those like *Brown*, *Salitros*, *Niece*, *Ostrach* and *Muller*, resulting in a disparate application of the interrelationships among the remedial statutes applicable to the ADA.

According to E.E.O.C. statistics, more than 189,000 ADA charges were received by it between July 26, 1992, and September 30, 2003. (Source: ADA Charges, FY1992-FY2003, at *www.eeoc.gov/stats/ada-charges.html*.) More

than 15,000 ADA charges were filed by claimants in fiscal year 2003 alone. *Id.* Given the number of ADA charges filed with the E.E.O.C. and the continuous burgeoning of employment discrimination litigation in the federal courts, review should not be delayed.

III. THE DECISION BELOW IS MANIFESTLY INCORRECT

The Court's review is also warranted because the Seventh Circuit's decision that Petitioner is not entitled to compensatory and punitive damages with a corresponding right to a trial by jury is manifestly incorrect.

1. The Seventh Circuit stands alone among the several circuits which permit juries to award compensatory and punitive damages under 42 U.S.C. § 12203 to ADA plaintiffs claiming retaliation by their employers. The reasoning of the sole district court case upon which the Seventh Circuit relies, *Brown v. City of Lee's Summit*, is ignored by later decisions of the Eighth Circuit permitting juries to award those damages as provided by 42 U.S.C. § 1981a. The more logical and compelling rationale is contained in *Lovejoy-Wilson v. NOCO Motor Fuels, Inc.*, 242 F. Supp. 2d 236 (W.D.N.Y. 2003).

2. In a discrimination claim that involves retaliation, it is clear that if any claim warrants compensatory and punitive damages, it is the retaliation claim. Retaliation constitutes malicious conduct against an employee for engaging in a protected activity like filing a charge of discrimination with the EEOC. If injunctive relief is the only remedy for such conduct, the employer has a license to retaliate, and, based on the Seventh Circuit's decision, it cannot be punished to any greater extent than the original discrimination claim.

In other words, the Seventh Circuit's decision against Petitioner and its interpretation of the expanded remedies under the ADA by 42 U.S.C. § 1981a is a perverse — indeed backwards — reading of the available remedies for an employer's retaliation. If compensatory and punitive damages are available for routine disability or lack of reasonable accommodations claims, then surely they are available for intentional retaliatory actions taken by an employer under the penumbra of 42 U.S.C. § 2000e-5.

3. The legislative history of the ADA supports Petitioner's claim for a trial by jury on the issue of compensatory and punitive damages. In *Rhoads v. Federal Deposit Ins. Corp.*, 2002 WL 31755427 (D. Md. 2002), the district court examined the legislative history of the ADA and the Fourth Circuit's precedent for available damages:

> The Fourth Circuit, however, in *Baird v. Rose*, 192 F.3d 462, 471-72 (4th Cir. 1999), noted that the remedies available for a violation of 42 U.S.C. § 12203 in the employment context are set forth in 42 U.S.C. § 12117, which 'specifically makes the remedies available under Title VII applicable to actions under the ADA.' See also *Fox v. Gen. Motors Corp.*, 247 F.3d 169, 175-76 (4th Cir. 2001) (stating that Congress evinced its knowledge of the parallel nature of Title VII and the ADA when it provided that '"the powers, remedies, and procedures set forth in [Title VII] shall be the powers, remedies, and procedures [the ADA] provides"' (quoting 42 U.S.C. § 12117(a)). *Id.*

The legislative history of the ADA also supports the proposition that damages available under Title VII of the 1964

Civil Rights Act are also available in actions brought under the ADA. One court noted that the ADA committee reports "clearly indicate Congress' intent to parallel the powers, remedies and procedures developed by case law under Title VII." *Baumgardner v. County of Cook*, 108 F. Supp. 2d 1041, 1044-45 (N.D. Ill. 2000). In fact, the *Baumgardner* court noted that a committee report stated that "'if the powers, remedies, and procedures change in Title VII of the 1964 Act, they will change *identically* under the ADA for persons with disabilities . . . the Committees' intent is that the remedies of Title VII, currently and as *amended* in the future, will be applicable to persons with disabilities.'" *Id.* (Emphasis added). (quoting H.R. REP. No. 101-485, pt. 3, at 48 (1990)). Accord, *Rhoads*, 2000 WL 31755427 at 1.

4. In a recent law review article, the commentator addressed and analyzed the issue of whether a plaintiff alleging retaliation under the ADA may recover compensatory and punitive damages under 42 U.S.C. § 1981a and whether it encompasses 42 U.S.C. § 12203, thus providing a plaintiff with a right to a jury trial. Mark C. Weber, *Workplace Harassment Claims Under the Americans with Disabilities Act: A New Interpretation*, 14 Stan. L. & Pol'y Rev. 241, 262 (2003). The article examines and analyzes some of the contradictory case law cited in this Petition. Professor Weber concludes that compensatory and punitive damages should be available to those who claim retaliation:

> The Civil Rights Act of 1991 makes direct reference to Title I and II provisions rather than to section 12203 which is found in Title V. Nevertheless, the incorporation-by-reference pathway leads in a straight line from ADA Title V's section 12203 to ADA Titles I and II to the

> Civil Rights Act of 1964 to the Civil Rights Act of 1991, placing section 12203 squarely within section 1981a. The conclusion that damages lie at the end of this chain is buttressed by the principle that courts construing the remedial provisions of federal statutes should assume the existence of the full range of remedies, including damages relief.
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>
> The cross referenced statute [1964 Civil Rights Act] can hardly be expected to contain language directly covering the statute doing the cross-referencing. The whole point of incorporating another law by reference is that the incorporated law does not include the conduct covered by the law and does not itself refer to the provision that is doing the cross-referencing. Accordingly, *Ostrach* [*v. Regents of Univ. of California*, 957 F.Supp. 186 (E.D. Cal. 1997)], has the better of the remedies argument, and damages should be available for violations of section 12203, both those relating to coercion and those relating to retaliation.

5. Other courts have held that Title VII's remedies are the same remedies available for an ADA retaliation violation. *Baird v. Rose*, 192 F.3d 462, 471-72 (4th Cir. 1999) ("The remedies available for a violation of the antiretaliation provision of the ADA in the employment context are set forth in 42 U.S.C.A. §12117.") *Id.* As the *Baird* court observed, Section 12117 specifically makes the remedies available under Title VII applicable to actions under the ADA, citing 42 U.S.C. § 12117(a) (which states that "[t]he powers, remedies, and procedures set forth in section . . . [2000e-5]

. . . of this title shall be the powers, remedies, and procedures this subchapter provides to . . . any person alleging discrimination on the basis of disability"). *See also Veneziano v. Long Island Pipe Fabrication & Supply Corp.*, 238 F. Supp. 2d 683, 689 (D.N.J. 2002) ("42 U.S.C. §12203(c) directs a person alleging a retaliation claim in the employment context of 42 U.S.C. §12117 to find the remedies available to him or her for a violation of Section 12203. Section 12117, in turn, refers to the remedial provision of Title VII.").

6. It is undisputed that the Civil Rights Act of 1991, 42 U.S.C. § 1981a, provides that compensatory and punitive damages are available for Title VII violations. *David v. Caterpillar, Inc.*, 324 F.3d 851, 865 (7th Cir. 2003) ("Title VII authorizes an award of punitive damages when a plaintiff demonstrates that the employer has engaged in intentional discrimination 'with malice or with reckless indifference to the federally protected rights of an aggrieved individual.' 42 U.S.C. § 1981a(b)(1)."); *Worth v. Tyer*, 276 F.3d 249, 268 (7th Cir. 2001) (upholding award of $20,000 in compensatory damages for Title VII retaliatory discharge). Accord, *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 180-81 (4th Cir. 1998) (Title VII plaintiff can recover compensatory damages under 42 U.S.C. § 1981a). Therefore, it is logical that if compensatory and punitive damages are available under Title VII for a retaliatory discharge, then they also are available to Petitioner under the ADA because the ADA remedies are the same as those under Title VII, 42 U.S.C. § 2000e-5, and its amendments like 42 U.S.C. § 1981a. There is a long-established principle that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684, 66 S. Ct. 773, 777 (1964). As the

Court has more recently explained, where Congress provides a cause of action, a federal court must "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66, 112 S.Ct. 1028, 1032 (1992).

As it stands now, plaintiffs claiming retaliation under the ADA in the Seventh Circuit cannot recover compensatory and punitive damages and do not have a right to a trial by jury while those in other circuits are so entitled. It is clear that the 1991 Civil Rights Act, 42 U.S.C. §§ 1981a(a)(1) and (2), expanded the available remedies to a plaintiff seeking all remedies under 42 U.S.C. § 2000e-5 like Petitioner here, including compensatory and punitive damages. Therefore, given the profound impact of depriving ADA plaintiffs of their Seventh Amendment right to a jury trial, the split in the circuits on settled ADA law and the resulting disparate application of the ADA retaliation remedies throughout the country, the Court should take this opportunity now to resolve this critical damages and jury trial question.

CONCLUSION

This petition for a writ of certiorari should be granted.[1]

Respectfully submitted,

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1. In view of the unsettled law now created by the decision below, Petitioner respectfully suggests, in the alternative, that the Court invite the Solicitor General to file a brief expressing the views of the Equal Employment Opportunity Commission.